IN THE

Supreme Court of the United States

October Term, [illegible]

WILLIAM HENRY PACKARD,

Appellant,

against

JOAB H. BANTON, District Attorney in and for the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York,

Appellees.

REPLY BRIEF FOR APPELLANT

LOUIS J. VORHAUS,
Attorney for Appellant.

ARTHUR B. [illegible],
of Counsel.

[illegible] Press, [illegible] St., N. Y. [illegible]

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WILLIAM HENRY PACKARD, Appellant, against JOAB H. BANTON, as District Attorney of the County of New York, and CHARLES D. NEWTON, Attorney General of the State of New York, Appellees.	No. 126.

APPELLANT'S REPLY BRIEF.

The brief submitted by *amicus curiae* satisfactorily controverts much of the argument submitted in behalf of the appellees. Effort will be made, therefore, to refrain from extensive repetition.

Counsel for the District Attorney contends (page 25 of his brief): "It cannot be doubted that the Legislature of the State of New York has power to regulate the manner in which the business of operating motor vehicles to carry passengers for hire shall be conducted within the State. Reasonable regulations which are designed to protect the public safety and which are adapted to that end

may be imposed." As an assertion of a well-known principle of law this cannot be controverted. But is the present statute such a "regulation"? Assuredly it in no way affects or "regulates" the manner in which the appellant's business is to be conducted. The language of Mr. Justice Brewer in *Gulf, C. & S. F. R. R. Co.* v. *Ellis*, 165 U. S. 150 (cited in the brief of the *amicus curiae*), is here in point:

> "But if the classification is not based upon the idea of special privilege, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? * * * But a mere statute to compel the payment of an indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts," etc.

Counsel for the District Attorney would have us assume (p. 27) that the Legislature in adopting this particular classification "had information in its possession which justified the action taken." While there is undoubtedly dicta to this effect in Federal cases cited, it must be assumed that such expressions were given in connection with cases where a reasonable cause for classification was apparent. It is equally obvious that to adopt such an assumption unqualifiedly would entirely foreclose under any circumstances any claim of arbitrary classification.

Mr. Justice Brewer said in the *Ellis* case:

> "While good faith and a knowledge of existing conditions on the part of the legislature is to be presumed, yet to carry that

> presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clause of the 14th Amendment a mere rope of sand in no manner restraining State actions."

Let us, in any event, inquire into the nature of this "convincing information of the existence of facts which rendered it necessary and desirable" to limit the operation of these penal provisions to the appellant and others similarly situated. The learned counsel for the District Attorney asserts (p. 27) that the "information" rendered it "necessary and desirable to require owners of taxicabs to give proper security to insure the payment of judgments which might be recovered against them." He further contends that "many taxicabs are owned and operated by persons who are financially irresponsible." If this be the purpose of the act (as indeed seems to have been held by the State Court in *People* v. *Martin*, 203 App. Div. 403), we may then characterize it as an act for the purpose of compelling the payment of certain debts by a particular class of individuals. As such it comes within the decision of Justice Brewer in the *Ellis* case. This decision has been the subject of citation in subsequent cases before this Court, but we believe the principle laid down above has not been changed.

But, contends the District Attorney, it was the further purpose of the act to "bring taxicab owners to a sense of their responsibility to the public for the negligent operation of their taxicabs." It is difficult to determine any causal relation between

such an assumption and the plain language of the act itself; how such an object can be accomplished in the manner prescribed by the statute is not entirely clear. But when the appellee states (p. 28) that the "number of deaths and other injuries caused by the operation of taxicabs is very much greater proportionately than the number of deaths and injuries caused by the operation of other motor vehicles" he is assuming a state of facts clearly negatived by the statistics before the Court.

The records of the Chief Medical Examiner's office in the City of New York indicate the number of deaths upon the highways of New York City, caused by the operation of motor vehicles to be as follows:

1918	Taxicabs,	24	Other	motor	vehicles,	648
1919	"	23	"	"	"	686
1920	"	26	"	"	"	672
1921	"	53	"	"	"	738

In *People* v. *Martin* (*supra*), proof was received by stipulation that the number of taxicabs was less than 4 per cent. of the total number of motor vehicles using the streets of the City of New York. The Court there stated that the records indicated the ratio of casualties from taxicabs to be in excess of the ratio for other vehicles. But the learned Court failed to note that the taxicab plies its trade upon the streets of New York approximately twenty hours in the day, while it is doubtful whether, upon an average, other motor vehicles operate more than one-tenth of that time.

We fail to note, therefore, any particularly alarming significance in these statistics, justifying the Legislature in arbitrarily legislating against one

group of individuals, and permitting others, constituting 95 per cent. of the same class, and who form collectively a far greater source of danger, to operate unrestrained. Indeed, we doubt whether this was the "information" before the Legislature, justifying the act in question. But if the great evil to be remedied was the existence of unpaid judgments against owners of taxicabs, there are undoubtedly similar judgment debts, and for the same causes, against the owners of other motor vehicles. We here respectfully suggest that it is manifestly impossible to substantiate such a contention by resort to any records or statistics. This is at the most a mere surmise upon the part of the appellees.

The case of *Patsone* v. *Pennsylvania*, 232 U. S. 138, cited by appellees, is, therefore, of no aid to their contention; for there the legislation was directed against "those from whom the evil mainly is to be feared" and the danger was "characteristic of the class named" (p. 144).

The Attorney General in Point I of his brief refers to the various provisions of the New York Consolidated Laws requiring individuals engaged in specified callings, to furnish bonds, usually conditioned upon their compliance with the laws regulating their respective vocations. There exists, however, no analogy to the case at bar:

First: These statutes seek directly to regulate a public business; commission merchants, who are bonded for the purpose of rendering honest accountings, are in this respect regulated directly with respect to their business.

Second: No attempt is made in these statutes to arbitrarily discriminate in favor of part of any particular class and against others forming the same class and doing business under the same circumstances.

Third: The bonds required by the statutes cited are to secure the public against "misrepresentation, fraud and deceit," to secure honest accountings to consignors, against "misconduct or fraud" by pawnbrokers, etc. These bonds are merely sureties to the people of the state that the very requirements necessitating the regulation by license, will be complied with.

It cannot be assumed that the law now under review, requiring less than 5 per cent. of the operators of motor vehicles in New York City, to furnish security for the payment of judgments against them is in any sense a regulation of the business of transporting passengers for hire. The payment of the judgments referred to in the act is not a reasonable incident to the appellant's business. The danger of injury to persons or property is an incident to the general use of the highway in no sense peculiar to the appellant, but generally attributable to users of the highway by operation of all motor vehicles. The primary meaning of the word "regulate" is to "lay down a rule by which a thing shall be done" (*State* v. *Lowry*, 166 Ind. 372).

In *People* v. *Beakes Dairy*, 22 N. Y. 428, cited by the Attorney General, the Court upheld the statute requiring dealers in milk to furnish bonds, as applied to the particular defendant, simply upon the

ground that the Legislature was exercising its reserved power to amend the defendant's corporate charter (p. 433).

Hendrick v. *Maryland*, 235 U. S. 610, is by no means in point. There the purpose of the act was to raise revenue to defray the expense of maintaining the State system of highways; it was general in its scope and related to all motor vehicles. The appellant was not in a position in that case to assert its unconstitutionality.

The decision of this Court in *Kane* v. *New Jersey*, 242 U. S. 160, has no relation to the questions here discussed. The requirement that non-resident automobile owners designate the Secretary of State as a person upon whom process may be served in their behalf, was not a discrimination against them, but rather a requirement putting such non-resident class upon an equality with resident owners.

The reference to *People* v. *Rosenheimer*, 209 N. Y. 115, does not sustain the position of the appellees. The present issue of arbitrary selection or discrimination was not raised. The Court merely applied the familiar principle of State control of highways to the particular facts there disclosed.

The Attorney General refers to decisions sustaining acts of State Legislatures, claimed to be similar to the one at bar, and emphasizes the decision of the Federal District Court for Western Tennessee (*Nolan* v. *Reichman*, 225 Fed. 812). The quotation from the opinion attributes certain characteristics to owners of motor taxicabs, which as a mat-

ter of common knoweldge are equally attributable to owners of all motor vehicles.

It is possible, as contended by the Attorney General (pp. 14-15), that the Legislature is not bound to "cover the whole field of possible abuses." That view has been variously applied, not only with relation to the limitation of the remedies to certain individuals, but to limitation of the nature of the remedies. But we are here concerned with circumstances calling for different conclusions, although possibly not inconsistent with that view. There can be no question of the identity of the persons from whom the danger sought to be guarded against, can be reasonably apprehended. It becomes manifest upon a mere reference to the statute and its objects. If the Legislatures, in the cases cited, had declared the existence of particular evils from the conduct of certain occupations, and then proceeded to apply its remedy to some persons of that particular class, permitting others to continue unrestrained, it is at least questionable whether the Court would have upheld the legislation upon the ground that the Legislatures were not obligated to "cover the whole field of possible abuses."

The question is raised in this Court, by the District Attorney, that the appellant is not entitled to relief by injunction. We believe it now to be fully established that the appellant's right to the relief may be sought in the form now before the Court (see cases cited pp. 16-17 of main brief of appellant). The District Attorney, in contending that the jurisdictional amount of $3,000 is not involved, and citing paragraph Fifth of the bill of complaint, has overlooked the fact that the appel-

lant is the owner of four of the vehicles mentioned in the act in question.

The decree of the District Court should be reversed.

Dated, New York, November 19, 1923.

LOUIS J. VORHAUS
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of Counsel.